TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 480.

CLARENCE MURPHY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED DECEMBER 20, 1899.

(17,594.)

(17,594.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 480.

CLARENCE MURPHY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

	Original.	Print
Writ of error	1	1
Return on writ of error	2	2
Indictment	3	2
Writ of error from supreme judicial court	7	4
Order of supreme judicial court, January 6, 1899	8	5
Sentence passed January 7, 1899	9	5
Bill of exceptions	10	5
Rescript	12	7
Brief statement of the grounds and reason of decision	12	7
Opinion	14	7
Petition for writ of error	23	11
Assignment of errors	23	11
Bond on writ of error	25	12
Citation and service	27	13
Clerk's certificate	28	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 3, 1900.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Salem, within and for the county of Essex, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Commonwealth of Massachusetts, plaintiff, and Clarence Murphy, defendant, on an indictment for embezzlement, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Clarence Murphy, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville Fuller, Chief Justice of the said Supreme Court, the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
Per BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by—

ALBERT MASON,
Chief Justice Superior Court.

1—480

2 COMMONWEALTH OF MASSACHUSETTS, } ss.:
Essex, }

And now here the judges of the superior court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, E. B. George, clerk of said superior court, have hereto set my hand and the seal of said court this twenty-sixth day of December, A. D. 1899.

[Seal of the Superior Court.]

E. B. GEORGE, *Clerk.*

3 COMMONWEALTH }
vs.
CLARENCE MURPHY. }

Transcript of Record on the Superior Court of the Commonwealth of Massachusetts for the County of Essex.

Indictment.

At the superior court held at Salem, within and for the county of Essex, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and ninety-six, by adjournment from the fifteenth day of May, A. D. 1896, at Newburyport.

The jurors for the Commonwealth of Massachusetts present that Clarence Murphy, late of Salem, in said county of Essex, on the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-two, at Salem, in said county of Essex, being then and there in the employment of a certain incorporated bank, to wit, the Salem savings bank, a corporation duly established under the laws of said Commonwealth, the said Clarence Murphy not being then and there an apprentice to the said Salem savings bank and not being a person under the age of sixteen years, did then and there, by virtue of said employment, have, receive, and take into his possession certain moneys to a large amount,

4 to wit, to the amount of one hundred dollars, of the value of one hundred dollars, of the properties and moneys of the said Salem savings bank, in the bank of the said Salem savings bank there situate being, and the said Clarence Murphy the said money then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said Salem savings bank, whereby and by force of the statute in such case made and provided the said Clarence Murphy is deemed to have committed the crime of larceny in said bank; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Clarence Murphy then and there, in manner and form aforesaid, the said money, of the properties and moneys of the said Salem savings bank, from the said Salem savings bank feloniously did steal, take,

and carry away in the bank aforesaid, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

(Thereafter follow sixty-four counts in all respects similar to the foregoing, except that the dates of the offences and the number of dollars alleged therein to have been embezzled are different.)

(Count 66.) And the jurors aforesaid on their oath aforesaid do further present that Clarence Murphy, late of Salem, in said county of Essex, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-two, at Salem, in said county of Essex, being then and there the clerk, servant, and agent of a certain incorporated company, to wit, the Salem
5 savings bank, a corporation duly established under the laws of said Commonwealth, the said Clarence Murphy not being then and there an apprentice to the said Salem savings bank and not being a person under the age of sixteen years, did then and there by virtue of said employment have, receive, and take into his possession certain moneys to a large amount, to wit, to the amount of two thousand dollars, of the value of two thousand dollars, of the property and moneys of the said Salem savings bank, and the said Clarence Murphy the said money then and there feloniously did embezzle and fraudulently convert to his own use without the consent of the said Salem savings bank, whereby and by force of the statute in such case made and provided the said Clarence Murphy is deemed to have committed the crime of simple larceny; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Clarence Murphy then and there, in manner and form aforesaid, the said money, of the property and moneys of the said Salem savings bank, from the said Salem savings bank feloniously did steal, take, and carry away, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

(Thereafter follow sixty-three counts in all respects similar to the foregoing, except that the dates of the offences and the number of dollars alleged therein to have been embezzled are different.)

This indictment was found at January term, 1896. When said Murphy was set to the bar and had this indictment read to him, he said that thereof he was not guilty, and for trial put him-
6 self upon the country, and the case was continued to this term; and now said Murphy moves that said indictment be quashed; which motion is allowed by the court as to the first sixty-five counts of said indictment and overruled as to all remaining counts. A jury is thereupon impanelled and sworn to try the issue, viz., William D. Gardner, foreman, and fellows, viz., J. Warren Berry, Daniel W. Eaton, Walter F. Gould, George E. McDonald, William McGinley, William F. Marston, Austin Shackelford, Luther G. Morrison, Lysander N. Nichols, George M. Norris, Jonathan F. Ober, who, after hearing all matters and things concerning the same, return their verdict and upon their oath do say that said Murphy is guilty on each and every count from the sixty-sixth count to close of said indictment, inclusive.

It is therefore considered by the court that said Clarence Murphy be punished by imprisonment for the term of not less than ten years nor more than fifteen years, one day thereof to be in solitary confinement, the residue at hard labor, and that this sentence be executed upon him in the State prison at Boston, in the county of Suffolk, and that he stand committed in execution of this sentence.

Sentence passed May 29, 1896.

On June 8, 1898, a writ of error was issued out of the supreme judicial court for the Commonwealth of Massachusetts in this case in terms as follows:

7 *Writ of Error.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss.:*

To our trusty and well-beloved Albert Mason, Esquire, chief justice of our superior court, Greeting:

Because in the record and proceedings and also in the rendition of judgment, between us, The Commonwealth of Massachusetts and Clarence Murphy, in an indictment that was prosecuted in our superior court held at Salem, within and for the county of Essex, on the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-six, manifest error hath happened, as it is said, to the great damage of the said Clarence Murphy, as by his complaint we are informed, we, willing that the error, if any hath been, should be duly amended and full and speedy justice done therein to the said parties, do command you that, if the judgment be therein rendered, you distinctly and openly send us the record and process of the suit aforesaid, with all things touching them, under your seal, together with this writ, so that we may have them before our justices of our supreme judicial court, to be held at Boston, within and for the county of Suffolk, on the first Monday of July next, that, inspecting the record and process aforesaid, we may, for correcting that error therein, further cause to be done what of right and according to law shall be to be done.

Witness Walbridge A. Feild, Esquire, at Boston, this eighth
8 day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER,
Assistant Clerk.

On June 13, 1898, said writ was served in this court and the following return made thereon:

ESSEX, *ss.:*

Pursuant to the precept of this writ, to me directed, I herewith send the record and process of the suit and process within mentioned, with all things touching the same, all of which are hereunto annexed, to the honorable the justices of the supreme judicial court within named.

In testimony whereof I hereunto put my hand and seal this thirteenth day of June, 1898.

ALBERT MASON,
Chief Justice of the Superior Court.

The record and all things mentioned in said return were the record hereinbefore set forth, which was annexed to said return.

Said case was continued for the judgment of the supreme judicial court until the sixth day of January, A. D. 1899, when said supreme judicial court ordered the following entry to be made:

"The full court reverses the sentence of the superior court for the county of Essex in the case of The Commonwealth *vs.* said
9 Clarence Murphy, and orders the same remanded to said superior court for sentence by that court according to the law as it was before the Statute 1895, ch. 504, took effect, and a certified copy of this rescript be sent by the clerk of the supreme judicial court for the county of Suffolk to the superior court for the county of Essex."

A certified copy of said rescript was thereupon filed with the clerk of the superior court for the county of Essex, bearing the teste of the clerk of said supreme judicial court.

Thereupon it is considered by this court that the said Clarence Murphy be punished by imprisonment for the term of nine years ten months and twenty-one days, the first day thereof to be in solitary confinement and the residue at hard labor, and that this sentence be executed upon him in the State prison in Boston, in the county of Suffolk, and that he stand committed in execution of this sentence.

Sentence passed January 7, 1899.

To which the said Clarence Murphy alleged exceptions, which were allowed by this court, and the case was continued for the judgment of the supreme judicial court. Said exceptions were as follows:

10 *Defendant's Bill of Exceptions.*

On May 28, 1896, the defendant in the above-entitled case, a citizen of the Commonwealth of Massachusetts and of the United States, was tried on an indictment which charged the defendant in 64 counts with the embezzlement of different sums of money on different days between July 19, 1892, and November 29, 1893, contrary to the provisions of section 40 of chapter 203 of the Public Statutes of this Commonwealth. The first count of said indictment was as follows:

(Here follows a copy of the first count aforesaid of the indictment.)

The remaining counts of said indictment differed from said first count only in the dates of the offences and the numbers of dollars.

The defendant was found guilty on each and every count of this indictment, and on May 29, 1896, was sentenced, under chapter 504

of the acts of this Commonwealth for 1895, to imprisonment in the State's prison of the Commonwealth at Boston for the term of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and the residue at hard labor, and on said day the defendant, in execution of said sentence, was committed to said prison.

The defendant, in execution of said sentence, remained in said prison for one day in solitary confinement, and remained in said prison continuously from May 29, 1896, to January 7, 1899.

On June 8, 1898, the defendant petitioned to the supreme
11 judicial court for a writ of error, assigning for cause that said chapter 504, as applied to the offences aforesaid, was contrary to the provisions of the Constitution of the United States and of this Commonwealth. On said petition a writ of error issued, and upon consideration thereof the supreme judicial court, on January 3, 1899, reversed said judgment sentencing this defendant and ordered that his cause be remanded to the superior court, and that he be resentenced in accordance with the law as it existed prior to the passage of said chapter 504.

On January 7, 1899, pursuant to said decision and the rescript issued thereon, the defendant was brought before this court and resentenced for the same offences for which the original sentence aforesaid had been imposed, which last sentence was to the said State's prison of the Commonwealth, at Boston, for the term of nine years ten months and twenty-nine days, the first day thereof to be in solitary confinement and the residue at hard labor.

Just prior to imposing said last sentence the court stated to the attorney for the defendant that as the defendant had already suffered one term of solitary confinement for the offences for which he was now to be sentenced, it would prefer not to resentence the defendant to solitary confinement, and that it would not sentence to solitary confinement if the attorney for the defendant would file a written waiver by the prisoner of such provision; but the attorney for the defendant stated that he did not feel justified in filing such a waiver.

The defendant duly excepted to said sentence last imposed and requested that all his rights be reserved, meaning thereby, but it was not so stated to the court at the time, that he excepted to said sentence on the ground that he had already been in jeopardy
12 for the same offence; that said sentence abridged the privileges and immunities of the defendant as a citizen of the United States and deprived him of his liberty without due process of law; that said sentence was in violation of the defendant's rights under article 14 of the amendments to the Constitution of the United States; that the court could not lawfully sentence him to the State's prison for said time or to solitary confinement; that the court could not lawfully resentence him in any manner, and that said sentence was contrary to the provisions of the constitution of this Commonwealth and of the Constitution of the United States; which request the court granted and reserved all the defendant's rights to except to said sentence.

The defendant prays that said exceptions may be allowed.
By his attorneys, BRANDEIS, DUNBAR AND NUTTER.

Allowed.
EDGAR J. SHERMAN,
Justice Superior Court.

At the September term, 1899, to wit, October, 1899, these exceptions were overruled by said supreme judicial court and the following rescript filed with this superior court:

Rescript.

In the case of The Commonwealth *vs.* Murphy, pending in the superior court for the county of Essex, ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz: "Exceptions overruled."
By the court:
HENRY A. CLAPP.

October 19, 1899.

Brief Statement of the Grounds and Reasons of the Decision.

13 The defendant was not put in jeopardy twice by the resentence, and his constitutional rights have not been abridged or interfered with. See opinion.

The opinion of said supreme judicial court mentioned in said rescript, with the certificate of the reporter of decisions of said court, is as follows:

14 COMMONWEALTH OF MASSACHUSETTS,
BOSTON, *November* 25, 1899.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Commonwealth *vs.* Murphy, decided on the 19th day of October, 1899.

GEO. F. TUCKER,
Reporter of Decisions.

15 COMMONWEALTH
v.
MURPHY.

MORTON, *J.:*

The defendant in this case was the plaintiff in error in the case of Murphy *v.* Commonwealth, 172 Mass., 264. In that case it was held that the statute under which he was sentenced was unconstitutional so far as it related to past offences, and the sentence which had been imposed was reversed and the case remanded to the superior court, under Pub. St., c. 187, sec. 13, for sentence according to the law as it was when the offence was committed and before the statute under which he was sentenced took effect. The defendant was brought before the superior court on January 7, 1899, pursuant to

that decision, and resentenced, the sentence being to the State prison for nine years ten months and twenty-nine days, the first day solitary and the rest at hard labor. Under the previous sentence he had been sentenced to the State prison for not less than ten nor more than fifteen years, the first day to be in solitary confinement. When he was resentenced he had served the solitary confinement and two years seven months and ten days under the original sentence. Prior to imposing the last sentence the court said that as defendant had already served the term of solitary confinement, he would prefer not to resentence him to solitary confinement if a written waiver thereof was filed by defendant's attorney. The attorney stated that he did not feel justified in filing such waiver, and thereupon sentence was imposed as aforesaid. The defendant duly excepted to the imposition of the last sentence, and requested that all his rights might be reserved, which was done.

16 The contention of the defendant is in substance that one who has been sentenced by a court having jurisdiction of the offence and of the person and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, cannot be resentenced if it turns out on a writ of error brought by him that the original sentence was unlawful. He contends in his own case that the resentence constituted a second punishment for the same offence; that he has been twice put in jeopardy thereby and has been deprived of his constitutional rights.

The statute under which the case was remanded contains no limitation on the power to remand for sentence in case of a reversal for error, but it is manifest that it cannot authorize the imposition of another sentence under such circumstances as would make it an interference with the constitutional rights of the prisoner. The question, then, is, Was the effect of the last sentence to put the defendant in jeopardy twice, or to punish him again for the same offence, or to abridge his privileges and immunities as a citizen of the United States?

By jeopardy is meant, we think, lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence, or acquittal, or what the law regards as such. It has been held in numerous cases that where, either for want of jurisdiction or from some defect in the indictment, or from such error in the course of the proceedings, the verdict has been set aside or the judgment has been arrested on a writ of error brought by the defendant, or on a motion made by him, and

17 he has been tried again, he was not thereby put in jeopardy a second time and his constitutional rights were not abridged. Commonwealth *v.* Wheeler, 2 Mass., 174; Commonwealth *v.* Peters, 12 Met., 387; Commonwealth *v.* Roby, 12 Pick., 496, 502; Commonwealth *v.* Lahy, 8 Gray, 459; Commonwealth *v.* Gould, 12 Gray, 171; McKee *v.* The People, 32 N. Y., 239; The People *v.* McKay, 18 Johns., 212; State *v.* Walters, 16 La. Ann., 400; Jones *v.* State, 15 Ark., 261; Turner *v.* State, 40 Ala., 21; Gerard *v.* People, 4 Ill. (3 Scam.), 362; State *v.* Redman, 17 Iowa, 329; State *v.* Sutton, 4 Gill. (Md.), 494;

Cooley's Const. Lim., 3rd ed., 327; Sedgwick on Stat. & Const. Law, 2nd ed., 572, 573, n. (*a*). One ground on which such a conclusion has been reached is that by bringing the writ of error or making the motion he is deemed to have waived any constitutional objection that he might have had to another trial or to the entry of a proper judgment. 2 Bishop Crim. Law, 2nd ed., secs. 672 *et seq.* If a second trial where the verdict has been set aside or the judgment arrested does not constitute legal jeopardy, it is difficult to see how the fact that a party may have served a portion of the sentence that has been set aside for error on proceedings instituted by him can rightfully object to the imposition of another and a lawful sentence by the court to which the case has been remanded. In this case the trial and conviction were, for aught that appears, regular and legal in all respects. The only error was in the sentence. It would be strange if there was no power anywhere to correct or to authorize the correction of the error on proceedings instituted by the prisoner except at the risk of delivering him from any further punishment for the offence of which he has been convicted. It is said in
18 McKee *v.* The People, 32 N. Y., 239, 245, where the case was remanded under a statute similar to ours, that the term jeopardy "has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction." And in Jeffries *v.* State, 40 Ala., 381, it was held that a prisoner could not plead *autre fois convict*, if the former conviction had been reversed on proceedings instituted by himself, notwithstanding he had served a part of the term of his imprisonment before the reversal. See also Jones *v.* State, 15 Ark., 261. In criminal proceedings the sentence is the judgment or at least an essential part of it.

Though the sentence in this case was in excess of the jurisdiction, it was not void, but voidable (Sennot's case, 146 Mass., 489; *Ex parte* Lange, 18 Wall., 163, 174), and if the defendant had completed the term for which he was sentenced he would have paid the penalty required and could not have been imprisoned or punished again for the same offence. Commonwealth *v.* Loud, 3 Met., 323. To that extent the sentence was lawful until reversed. Sennott's case, *supra;* Regina *v.* Drury, 3 C. & K., 193. Except for the statute authorizing the case to be remanded, he would have been entitled to a discharge, not because to resentence him was unconstitutional, but because at common law the court from which the writ of error issued could not itself pronounce the proper judgment or sentence or send back the case to the inferior court to do so. Shepard *v.* Commonwealth, 2 Met., 419; The King *v.* Bonner, 7 A. & E., 58; The King *v.* Ellis, 5 B. & C., 395. But a judgment and sentence reversed are the same as if there had been no judgment and sentence (Regina *v* Drury, *supra*), and this must be so even if the prisoner has served a
19 part of the sentence. Whether the confinement under the reversed sentence has been longer or shorter can on principle make no difference. Besides, the length of such confinement will depend somewhat, at least, on the promptness with which proceedings are instituted to secure a reversal. No doubt it would have been competent for the court to order that the last sentence should

take effect from the date of the first sentence (Jacquins *v.* Commonwealth, 9 Cush., 279), but we do not think that it was bound to do so, and though the effect of the resentence will be to compel the defendant to suffer solitary confinement twice, and will result, it is said, in his actual confinement for a longer period than the term for which he was originally sentenced, we do not see, for reasons already given, that the last sentence is rendered invalid thereby. The case is not one of the imposition of a second sentence for the same offence, or of the attempted correction of a sentence after the term has ended at which it was imposed and the court has adjourned without day—see Commonwealth *v.* Foster, 122 Mass., 317, 323—but it is a case where the sentence that was originally imposed has been reversed and declared unlawful upon a writ of error brought by the party aggrieved and the case has been remanded, as provided by statute, to the superior court for sentence according to the law as it was when the offence was committed. Cases in regard to the imposition of a second sentence as such, or in regard to the attempted correction of a sentence after the adjournment of the court, or the substitution of one sentence for another, do not apply. The defendant relies upon *Ex parte* Lange, 18 Wall., 163, and Feeley's case, 12 Cush., 598. In *Ex parte* Lange, *supra*, the statute
20 authorized fine or imprisonment, but the court imposed both. The prisoner paid the fine, and after it had been paid the court, at the same term, attempted to modify the sentence by changing it to imprisonment and substituting the sentence as thus modified for the original sentence of fine and imprisonment; but the supreme court held that the prisoner, having satisfied one of the alternative penalties provided by the statute, the sentence could not be changed and the other alternative penalty imposed. Manifestly that case is not like this. Feeley's case, *supra*, was much the same. The statute provided fine or imprisonment. The court imposed both, and the prisoner paid the fine and was committed pursuant to the other part of the sentence, and then petitioned for a writ of *habeas corpus* on the ground that he was unlawfully restrained of his liberty. This court granted the writ and ordered his discharge, on the ground that he had paid the fine, and the court below had no power to impose imprisonment. It is manifest that this case also does not help the defendant. The course that was followed in Murphy *v.* Commonwealth, *supra*, seems to have been followed in the Supreme Court of the United States, and apparently was not regarded as putting the prisoner in jeopardy or punishing him twice or as interfering with his constitutional rights. *In re* Bonner, 151 U. S., 242, 262; Reynolds *v.* United States, 98 U. S., 145, 168, note; Coleman *v.* United States, 97 U. S., 509, 519.

We do not discover in what has been done anything by which the privileges or immunities of the defendant as a citizen of the United States *has* been abridged in violation of the fourteenth amendment. The equal protection of the laws has not been
21 denied to him, and he has not been deprived of his liberty without due process of law. *Ex parte* Converse, 137 U. S., 624; Moore *v.* Missouri, 159 U. S., 673.

The fact that the court in Murphy *v.* Commonwealth, *supra*, may have taken a somewhat different view of St. 1895, c. 504, from that taken in Commonwealth *v.* Brown, 167 Mass., 144, does not constitute an interference with the defendant's rights.

Exceptions overruled.

22 [Endorsed:] Commonwealth *vs.* Murphy. Certified copy of the opinion of the supreme judicial court.

23 On December 23, 1899, said Clarence Murphy filed in this superior court an assignment of errors in this case and a petition for the allowance of a writ of error to this court, returnable to the Supreme Court of the United States, which is as follows:

Petition for Allowance of Writ of Error and Assignment of Error.

To the Honorable Albert Mason, Esquire, chief justice of the superior court of the Commonwealth of Massachusetts, now sitting at Salem, within and for the county of Essex:

Respectfully represents the petitioner, Clarence Murphy, that in the final judgment and sentence of this court in the above-entitled cause manifest error has been committed, and that said judgment and sentence are in said respects contrary to the Constitution of the United States, and assigns as errors in the judgment and the sentence aforesaid the following:

1. They are contrary to the provisions of the Constitution of the United States.

2. They deprive the petitioner of his liberty without due process of law, contrary to the provisions of article 14 of the amendments of said Constitution.

3. They abridge the privileges and immunities of the petitioner as a citizen of the United States, contrary to the provisions
24 of article 14 of the amendments of said Constitution.

4. They subject him to punishment under an *ex post facto* law, contrary to the provisions of section 10 of article I of said Constitution.

5. By them the petitioner suffers punishment twice for the same offence, and is placed twice in jeopardy therefor, contrary to articles 5 and 14 of the amendments of said Constitution.

6. By them the petitioner is compelled to suffer punishment under chapter 203 of the Public Statutes of Massachusetts, which the supreme judicial court of Massachusetts has held since his conviction to be not applicable to the punishment of the petitioner's offence after the passage of chapter 504 of the Acts of the Year 1895, and this although the petitioner has already suffered punishment under this latter act while it was still held applicable to his alleged offence.

7. By them the petitioner suffers a punishment which has been substantially changed since his conviction, after he has once suffered punishment for the same offence under chapter 504 of the Acts of 1895, which was then applicable to his offence.

8. By them the petitioner is compelled to suffer the punishment of solitary confinement twice for the same offence.

Wherefore the petitioner prays that a writ of error to this court, returnable to the Supreme Court of the United States, be allowed to him.

By his attorneys, BRANDEIS, DUNBAR & NUTTER.

25 A bond was thereupon filed in this court, and approved by the chief justice thereof, in terms following:

Bond on Writ of Error.

Know all men by these presents that we, Clarence Murphy, of Salem, in the county of Essex, and James F. Dean, of said Salem, and Felix Conlan, of Cambridge, in the county of Middlesex, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of five hundred dollars, to be paid to the said Commonwealth and its certain attorney; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a superior court of said Commonwealth, in a criminal prosecution depending in said court between said Commonwealth and said Clarence Murphy, as defendant, judgment was rendered against the said Clarence Murphy, and the said Clarence Murphy having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of January next:

Now, the condition of the above obligation is such that if the said Clarence Murphy shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CLARENCE MURPHY. [L. S.]
JAMES F. DEAN. [L. S.]
FELIX CONLAN. [L. S.]

Signed, sealed, and delivered in presence of—
ELIZA J. MURPHY.

Approved:
E. B. GEORGE,
Clerk of Superior Court of Essex County, Massachusetts.
ALBERT MASON,
Chief Justice Superior Court.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the superior court of the Commonwealth of Massachusetts for the county of Essex.

Attest: E. B. GEORGE,
Clerk Superior Court.

26 The Commonwealth of Massachusetts consents that the penal sum of this bond in the case therein mentioned be five hundred dollars, and does not care to be present or represented at the examination of the sureties.

J. M. HALLOWELL,
Ass't Attorney General for the Com. of Mass.

27 The foregoing writ of error was thereupon allowed and the following original citation issued and served, as appears therein:

The United States of America to the Commonwealth of Massachusetts and its attorney general, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the United States Supreme Court, wherein Clarence Murphy is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert Mason, Esq., this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Superior Court.]

ALBERT MASON,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

Due and sufficient service of this citation on the Commonwealth of Massachusetts and its attorney general is hereby accepted and acknowledged.

ARTHUR W. DE GOOSH,
Ass't Attorney General for the Commonwealth of Massachusetts.

28 I, E. B. George, the clerk of the superior court of the Commonwealth of Massachusetts for the county of Essex, hereby certify that the foregoing is a true copy of the record in this court in the case of The Commonwealth against Clarence Murphy, described in the foregoing writ of error, together with original citation issued thereon.

Witness my hand and the seal of this superior court this twenty-sixth day of December, 1899.

[Seal of the Superior Court.]

E. B. GEORGE.

Endorsed on cover: File No., 17,594. Massachusetts superior court. Term No., 480. Clarence Murphy, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed December 29th, 1899.

Supreme Court U. S.
FEB 22 1900

No. 220.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

CLARENCE HUDDY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

LOUIS D. BRANDEIS,
EZRA R. THAYER,
EDWARD F. MCCLENNEN,
Counsel for Plaintiff.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 480.

CLARENCE MURPHY, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error, a citizen of the United States, was, on May 29, 1896, sentenced by the Superior Court of Massachusetts to a period of imprisonment in the State prison of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and the residue at hard labor. This sentence followed upon the plaintiff's conviction for embezzlement by reason of acts done by him in 1893, and was imposed under a statute which took effect on Jan. 1, 1896, and contained the following provisions:

> "SECTION 1. When a convict is sentenced to the State prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted, and the minimum term shall not be less than two and one-half years."
>
> Mass. St. 1895, Chap. 504.

Wall 38] to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented so as to receive the attention of the court, and certainly was not considered or decided." . . .

"The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session at the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest." . . .

"The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and, without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing." 18 Wall. 167, 168, 175.

It will be observed that this decision was rendered in spite of the fact pointed out in the dissenting opinion (pp. 199–200) that the order vacating the former sentence rendered the imposition of the fine a nullity and entitled the prisoner to its return.

Ex parte Lange has been repeatedly approved by this court. So in United States *v.* Chouteau, 102 U.S. 603, 611, 612, the Court said:

"As it was justly said by this Court in *ex parte* Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same Court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law.' 18 Wall. 163, 168."

So in *in re* Snow, 120 U.S. 274, the Court held that the crime of unlawful cohabitation under the Act of Congress of 1882 for the suppression of polygamy in Utah, was a continuous crime, that the prisoner could therefore be sentenced for only one conviction during the period covered by the indictment, and that the attempt to impose a second sentence for separate acts was to put the prisoner twice in jeopardy and entitled him to his relief on *habeas corpus*. This was approved and reaffirmed in Hans Nielsen, petitioner, 131 U.S. 176.

The same conclusion has repeatedly been reached by State Courts of authority. In State *v.* Addy, 43 N.J. Law, 113, the defendant was convicted of maintaining a nuisance by obstructing a water-course. The Court suspended sentence on the defendant's payment of costs provided that he kept the water-course clear in the future. Subsequently the Court undertook to sentence him for the offence. It was held that such imprisonment was unlawful, and that although the Court had power in a proper case to suspend sentence, yet where the Court had required as a condition what it could only impose by sentence, it had in

effect already punished the defendant once, and could therefore impose no further sentence.

In State *v.* Warren, 92 N.C. 825, it was held that where, after a single day's confinement under a sentence to imprisonment, the sentence was remitted, and an order made and complied with that the defendant pay the costs and give security for his good behavior, a later sentence for the same offence was unlawful.

In Com. *v.* Loud, 3 Met. 328, service of a sentence passed on a complaint so defective that the Court was without jurisdiction was held a bar to a subsequent sentence.

In Feeley's case, 12 Cush. 598, a second sentence was held unlawful on facts almost identical with those of *ex parte* Lange.

In Brown *v.* Rice, 57 Me. 55, the prisoner was sentenced to a term of imprisonment, and within nineteen days the Court undertook to revoke the sentence and re-sentence him to a longer term. This sentence was held unlawful, and the Court said:

> "If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the same offence. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the State prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences, given at a considerable interval of time, for the same offence, and under one indictment." 57 Maine, 58.

The same decision was made by the Supreme Court of Michigan in People *v.* Meservey, 76 Mich. 223, and People *v.* Kelley, 79 Mich. 320: and by the Supreme Court of Oregon in State *v.* Cannon, 11 Ore. 312. These views are approved in Shepherd *v.* the People, 25 N.Y. 406.

So in *in re* Jones, 35 Neb. 444, the Court sentenced the defendant to an industrial school on the ground that he was under

eighteen years of age. Thereupon, after an interval of less than three weeks, having ascertained that he was in fact over eighteen, he was recalled by the Court and sentenced to the Penitentiary. It was held that the new sentence was unlawful and that the prisoner was entitled to his release.

That these decisions proceed upon the ground that the defendant has been put twice in jeopardy not only appears from the recognized power of the Court to revoke a sentence and impose a new one before any part of the first sentence has been executed (Commonwealth *v.* Weymouth, 2 All. 144), but was, moreover, expressly recognized by the Courts as the ground of the decision:

> "There must be restraint upon judicial authority over judgments rendered during the term, in such cases, or the fundamental maxim *nemo debet bis puniri pro uno delicto* would be violated. Let us suppose a judgment for corporal punishment, such as formerly might here be rendered, and its prompt and full execution during a term, can the sentence be set aside and all done under it annulled? The stripes upon the person or the painful pressure of the stocks or pillory with their attending humiliation could not be effaced." State *v.* Warren, 92 N.C. 825, 827, 828.

> "If the Court had formally adjudged that the defendant should abate the nuisance and pay the costs, it would have been unexceptionable. It should seem, therefore, *a fortiori*, that where the Court has made an order tantamount to such legal judgment and the defendant has complied with it, a mere informality ought not to justify the State in claiming a second sentence. The citizen cannot be put twice in jeopardy. By submitting to the demands of the Court, he pays the penalty of his offence once for all, and the power of the State to punish him is exhausted." State *v.* Addy, 43 N.J. L. 113, 117.

> "The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offence.

> The fundamental law of the State, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act." *In re* Jones, 35 Neb. 499, 502.

These conclusions in no way conflict with *in re* Bonner, 151 U.S. 242. The only error in the sentence in that case was the commitment of the prisoner to the wrong institution. This Court expressed the view that the Court which imposed the sentence might remove the erroneous feature of the sentence and commit the prisoner to the right institution, and pointed out the general power of the Court to correct erroneous sentences. The opinion lends no color, however, to the proposition that the Court can impose a new sentence as distinguished from correcting the old one, but on the contrary expressly recognizes that where the attempt goes beyond such a correction of an erroneous sentence, the power of the Court ceases.

> "Where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the Court that imposed the sentence in order that its defect may be corrected. . . . He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that Court for correction in that particular. . . . But in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the Court of which he complains. In such case the original Court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender." 151 U.S. 259, 260.

That the Court was careful to guard against too broad an application of these views appears again from the following passage:

> "In some cases, it is true, no correction can be made of the judgment, as where the Court had under the law no jurisdiction of the case; that is, no right to take cognizance of the offence alleged, and the prisoner must then be entirely discharged; but those cases are rare." 151 U.S. 262.

The distinction is again carefully taken in United States *v.* Pridgeon, 153 U.S. 48, 62.

> "The sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the Court over the person and offence, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

The facts in the present case clearly bring it within these exceptions, and within the decision in *ex parte* Lange.

II.

THE PLAINTIFF IN ERROR HAS RECEIVED A NEW SENTENCE OF THE KIND REFERRED TO ABOVE.

A. *The second sentence was a new sentence, and not a correction of the old.*

This appears upon the face of the sentence. The former sentence was not for any term of imprisonment, but on the contrary was imposed under an act expressly providing that the "court imposing the sentence shall not fix the term of imprisonment;" in other words, that the Court should commit the defendant to prison during an indeterminate period, subject to the control of certain specified persons (see p. 12 below). The new sentence for a fixed term could not be in its nature, and did not even purport to be, a correction of the old, but was essentially a different thing.

The point is moreover put beyond discussion by the fact that the new sentence contained a provision for solitary confinement. Under the decisions of the Supreme Judicial Court of Massachusetts this feature necessarily made the sentence a new one, distinct from the old.

> "The Court are of opinion that that provision applies to an original sentence only, and not to a sentence for additional punishment."

Bump *v.* Commonwealth, 8 Met. 553, 554.

B. *The second sentence was for a longer period than the first.*

This appears from a comparison of the following statutes, the first of which applies only to indeterminate sentences, and the second only to sentences for a fixed term:

> "Any convict, sentenced as aforesaid, whose record of conduct shows that he has faithfully observed all the rules of said prison, and has not been subjected to punishment, shall be entitled to release from said prison upon the expiration of the minimum term of his sentence; and he shall then be given a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence. Said permit shall be issued by the commissioners of prisons upon such terms and conditions as they shall establish." . . .
>
> (Mass. Stat. 1898, Chap. 371.)

> "Every officer in charge of a prison or other place of confinement shall keep a record of the conduct of each prisoner in his custody whose term of imprisonment is not less than four months. Each such prisoner whose record of conduct shows that he has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to a deduction from the term of his imprisonment, to be estimated as follows: upon a sentence of not less than four months and less than one year, one day for each month; upon a sentence of not less than one year and less

> than three years, three days for each month; upon a sentence of not less than three years and less than five years, four days for each month; upon a sentence of not less than five years and less than ten years, five days for each month; upon a sentence of ten years or more, six days for each month. . . . Each prisoner who is entitled to a deduction from the term of his imprisonment, as aforesaid, shall receive a written permit to be at liberty during the time thus deducted, upon such terms as the board granting the same shall fix. . . .
>
> (Mass. Pub. Stat., Chap. 222, Sect. 20.)

Under his former sentence the prisoner could thus have gained his liberty upon May 29, 1906, whereas, under the present sentence, even if he receives the maximum deduction, he cannot be released before July 3, 1907.

Not merely has the period of imprisonment been thus increased by more than a year, but it has also been extended in other ways. The theory of the judge imposing the second sentence was apparently that the original sentence of not less than ten years nor more than fifteen years was equivalent to a term of imprisonment for twelve and one-half years, and that sentence should therefore be imposed for that period less the time during which the plaintiff in error had been actually imprisoned. Even if the correctness of this theory be conceded, it should be observed that under the new sentence the prisoner not only is deprived of any right to the deductions to which he would have been entitled by good conduct during the long period (almost three years) of his previous actual imprisonment, but the deductions which he can hereafter receive are reckoned upon a term of less than ten years and can therefore in no event exceed five days in each month, whereas upon a sentence for more than ten years (corresponding with the actual period of his detention in prison) he might have earned six days per month.

The prisoner has thus received a new sentence substantially longer than his original sentence. This fact was not overlooked by the Supreme Judicial Court of Massachusetts, which distinctly says (Record, 9):

> "Whether the confinement under the reversed sentence has been longer or shorter can on principle make no difference."

If sentence can be increased in this manner, after its partial execution, there is no limit to the power of the Court short of the maximum term allowed by the statute regardless of the period served. The astonishing result thus necessarily follows that if the very defendants in Commonwealth *v.* Crowley and Commonwealth *v.* Brown had been sentenced to imprisonment for the maximum term, and had served all but a trifling part of their original sentence, which sentence was held valid by the Supreme Judicial Court when their exceptions were overruled, that Court would nevertheless now have the power to impose upon them a new sentence for the same maximum term without any allowance for their actual confinement in the State prison.

It is submitted that the mere statement of such a result is a sufficient answer to the position taken by the Commonwealth.

C. *The new sentence is altogether different in its nature from the old.*

The Statute of 1895 expressly provides that the Court shall not fix a term of imprisonment, but shall simply establish a maximum and a minimum during the interval between which the prisoner is held substantially at the pleasure of the prison commissioners subject to the approval of the governor and council. There is no limit to this interval except the maximum term fixed by law for the punishment of the offence on the one hand, and a minimum of two and one-half years upon the other. The indeterminate period may thus be much the largest part of the sentence. During this

whole period he is kept in suspense as to the time of his relief, and the question depends upon the favor of persons to whom he can have little or no personal access to see that his case has proper consideration. With many prisoners these circumstances might cause such distress of mind as would be in itself a serious additional punishment. The observations of the Court in Medley, Petitioner, 134 U.S. 160, 172, as to a much more limited period of uncertainty in the case of prisoners condemned to death, is applicable.

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the Penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

In People *v.* Cummings, 88 Mich. 249, such weight was given to these grounds in considering an indeterminate sentence act similar to the Massachusetts statute of 1895, that the Court held the entire act unconstitutional as granting an arbitrary power to the prison commissioners, and substantially establishing a cruel and unusual punishment.

D. *The prisoner has served in full one of the penalties imposed by the earlier sentence.*

The sentence of solitary confinement was imposed under the following statute:

"When the punishment of imprisonment in the State prison is awarded against a convict, the form of the sentence shall be that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment for such term as the Court shall direct, not exceeding twenty days at one time; and in the execution of such sentence, the solitary imprisonment shall precede the punishment by hard labor, unless the Court otherwise orders; but in case of severe illness of the convict, the warden, upon the certificate of the physician of the prison, may postpone the solitary imprisonment until the health of the convict is so far restored that his life will not be endangered by such solitary imprisonment."

(Pub. Stat., Chap. 215, Sect. 23.)

As to the stringent character of solitary confinement in Massachusetts, see Pub. Stat., Chap. 221, Sect. 29; Chap. 222, Sect. 3.

These statutes were fully considered and construed in Stevens *v.* Commonwealth, 4 Met. 360, and it was held that the sentence of solitary confinement must be for a part of the time comprised in the original sentence, but that within the limits of that sentence the term of solitary confinement was not limited except by the provision of the statute that solitary confinement must not exceed twenty days at one time.

The gravity of this part of the sentence is not a matter open to discussion since the decision in Medley, Petitioner, 134 U.S. 160, 171. In that case this Court, after a full and luminous examination of the history of solitary confinement, pointed out with clearness and emphasis that it constituted "an additional punishment of the most important and painful character."

This portion of the original sentence was unquestionably valid. It has been served in full, and no order of the Court can restore the plaintiff in error to his former position in respect to it. As was said in Brown *v.* Rice, 57 Maine, 55, 58, "If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment

suffered under it." Its effect on the prisoner can no more be removed than "the stripes upon the person or the painful pressure of the stocks or pillory with their attending humiliation" can be "effaced." (State *v.* Warren, 92 N.C. 825, 828.)

The circumstance that the solitary confinement in this particular case was in fact short, and that the judge imposing the second sentence felt the hardship and was willing, although unable, to avoid it, were mere accidents not affecting the constitutional rights of the plaintiff in error.

It is therefore submitted that the full execution by the prisoner of a serious and valid portion of the original sentence brings him directly within the decision in *ex parte* Lange.

E. *The original sentence was valid under the law of Massachusetts as it then existed.*

Among several prisoners sentenced at about the same time with the plaintiff in error under the indeterminate sentence law for acts committed before its passage, two carried the point to the Supreme Judicial Court, and in both cases that court held that the statute was intended to apply to them, and was valid.

> Commonwealth *v.* Brown, 167 Mass. 144.
> Commonwealth *v.* Crowley, 168 Mass. 121.

These decisions actually settled the law of the Commonwealth at the time they were rendered. Not only was the plaintiff in error justified in relying upon them, but for all practical purposes *they were law* until the decision in Murphy *v.* Commonwealth, 172 Mass. 264.

This was directly decided by the Court of Appeals of New York with reference to the period between Hepburn *v.* Griswold, 8 Wall, 603, and the reversal of that decision in the Legal Tender Cases, 12 Wall, 457.

> "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was as

applied to the relations between these parties, and to this case the law and not mere evidence of the law."

Harris *v.* Jex, 55 N.Y. 421, 424.

For the purpose of determining what is the law of a particular jurisdiction at any given time, no other test than the decisions for the time being of the court of last resort in that jurisdiction could work justice to the citizen, at least in a question of constitutional rights and personal liberty. In another class of cases it has been held by this Court that property rights fixed by decisions of the highest court of a State could not be affected by later decisions overruling them. (Gelpcke *v.* Dubuque, 1 Wall. 175.) And this applies *a fortiori* to rights of personal liberty. Actual imprisonment inflicted by the officers of a State in accordance with the law as declared by its highest court cannot by any fiction, or by any later modification of the views of that court, be disregarded or treated as a nullity.

The suggestion that the decisions in Commonwealth *v.* Brown, 167 Mass. 144, and Commonwealth *v.* Crowley, 168 Mass. 121, were in violation of the United States Constitution, and therefore could not be law, cannot affect this conclusion. Even if that point had been actually decided in Murphy *v.* Commonwealth, 172 Mass. 264, (which was not the fact, the real decision being upon the construction of the statute with reference to crimes committed before it became a law,) the imprisonment actually suffered by the plaintiff under the law as laid down and enforced by the highest court of the Commonwealth was none the less real; and the fact that the officers of the Commonwealth were acting in violation of the Constitution of the United States could not put them in a better position than they would otherwise have occupied.

The opinion of the Supreme Judicial Court of Massachusetts not only disregards these considerations but overlooks the dis-

tinction between correcting an invalid sentence by removing its excess or relieving against its erroneous features, and imposing a new sentence. It is respectfully submitted that not only is this an error, but that the suggestions of the Court that the time during which the prisoner has been actually in confinement can be disregarded, and that his assertion of constitutional rights can be deemed a waiver of other constitutional rights, are fictions which should not be recognized in a question of the right to personal liberty.

SECOND.

The prisoner's rights under the Constitution of the United States have been infringed.

I.

THE RIGHT NOT TO BE PUT IN DOUBLE JEOPARDY IS A PRIVILEGE AND IMMUNITY OF A CITIZEN OF THE UNITED STATES.

In O'Neil *v.* Vermont, 144 U.S. 323, 361, Mr. Justice Field said:

> "What are the privileges and immunities of citizens of the United States which are thus protected? These terms are not idle words to be treated as meaningless, and the inhibition of their abridgement as ineffectual for any purpose, as some would seem to think. They are of momentous import, and the inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible State invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, but after much reflection I think the definition given at one time before this court by a distinguished advocate — Mr. John Randolph Tucker, of Virginia — is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. Spies *v.* Illinois, 123 U.S. 131, 150. This definition is supported by reference to the history of the first ten Amendments to the Constitution, and of the amendments which followed the late Civil War.'

In the same case Mr. Justice Harlan, speaking for himself and Mr. Justice Brewer, said:

> "I fully concur with Mr. Justice Field that since the adoption of the Fourteenth Amendment no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, Articles of Amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the State." 144 U.S. 370.

The question was left open in that case by the majority of the Court (144 U.S. 331), and has not been directly passed upon in any later case; while in Moore *v.* Missouri, 159 U.S. 673, this Court, upon a writ of error to the Supreme Court of Missouri, considered and decided the question whether a statute of that State had put the plaintiff in error twice in jeopardy. Whether immunity from double jeopardy is a privilege or immunity of a citizen of the United States must therefore be regarded at least as an open question.

The view for which we contend has been earnestly supported by a distinguished text-writer (Guthrie's Fourteenth Amendment, 58–65), who draws a strong argument from the views of the Re-

construction Committee. See the language of Senator Howard in presenting the amendment to the Senate:

> "Such [citing Corfield *v.* Coryell, 4 Wash. C.C. 371, 380] is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be, — for they are not and cannot be fully defined in their entire extent and precise nature, — to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution: such as the freedom of speech and the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments."
>
> Cong. Globe, 39th Cong., 1st. Sess., pt. 3, pp. 2764–2765.
>
> Guthrie's Fourteenth Amendment, 60, 61.

> "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."
>
> Mr. Justice Miller in *ex parte* Bain, 121 U.S. 1, 12.

It follows that the right to be protected from double jeopardy, secured to the plaintiff in error as against the Federal government by the Fifth Amendment, is now guaranteed against the States by the Fourteenth Amendment. Even if the Fourteenth Amendment

does not go so far as to secure to citizens of the United States, as against the States, *all* the benefits of the first eight amendments, *e.g.*, those more particularly referring to procedure in the Courts of the United States, it must still be held to protect those fundamental and inherent rights which necessarily go with any system of government based on political liberty. It was of such a right that Mr. Justice Bradley said, in Boyd *v.* United States, 116 U.S. 616, 631, 632:

> "Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."
>
> (See also Counselman *v.* Hitchcock, 142 U.S. 547, 581.)

Foremost among these fundamental rights which have come down to us as a part of our political atmosphere ("ancient right unnoticed as the breath we draw") is the immunity from double jeopardy.

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. . . . These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States. . . . It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. . . . Judge McLean said, in a dissenting opinion, that 'the exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act.' 'It is contrary,' said he, 'to the nature and

genius of our government to permit an individual to be twice punished for the same act.'"

Ex parte Lange, 18 Wall. 163, 168, 170, 172.

If it were within the power of a State to repeal such fundamental and salutary principles of the common law and provide for double jeopardy, the guarantees of the Fourteenth Amendment would be of slight value, and that Amendment would altogether fail to accomplish the special objects which were most strongly before the minds of its framers. (See the able argument of Mr. John Randolph Tucker in Spies *v.* Illinois, 123 U.S. pp. 149, 150.) Where, as in Massachusetts, the constitution of the State has no provision against double jeopardy, the power of the Legislature in this particular is unlimited unless controlled by the Fourteenth Amendment; and the test of so dangerous a power must be the possibility and not the probability of its exercise.

II.

A SENTENCE WHICH PUTS A PRISONER A SECOND TIME IN JEOPARDY DEPRIVES HIM OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

The provisions of the Fourteenth Amendment with reference to "due process of law" do not limit the power of the States to regulate their procedure as they see fit, so long as the established principles underlying the administration of justice, either civil or criminal, are not infringed on, and the fundamental rights of citizens are not invaded. It does, however, require something more than due formality in judicial proceedings. It imposes on this court the necessity of examining the *substance* of the action of State legislatures and courts, to see whether there has been, beneath the form, any such violation of essential principles.

This has been recognized by repeated decisions of this Court.

Thus in Hodgson *v.* Vermont, 168 U.S. 262, 272, the Court, speaking through Mr. Justice Shiras, said:

> "We concede the proposition so earnestly urged on behalf of the plaintiff in error that by the Fourteenth Amendment it is made the right and the consequent duty of this Court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a State it is sought to arbitrarily deprive any person of his life, liberty, or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or entitled by the mere fact that the judgment complained of was reached by proceedings in a State court in pursuance of the provision of a State statute."

So in Brown *v.* New Jersey, 175 U.S. 172, 175, Mr. Justice Brewer, for the Court, said:

> "The State has full control over the procedure in its courts both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of *fundamental rights* or conflict with specific and applicable provisions of the Federal Constitution."

Accordingly, in that case the Court found it necessary to consider whether compelling a prisoner to submit to trial by a "struck jury" was such a denial.

The doctrine is comprehensively considered and applied in Chicago, Burlington, & Quincy R.R. *v.* Chicago, 166 U.S. 226. The plaintiff's sole contention in that case was that the judgment of the State Court awarding it but one dollar as compensation for the opening of a public street across its tracks deprived it of property without due process of law. The State constitution made provision for due compensation so that the action of the *court* alone was in question, but as this Court observes:

> "The prohibitions of the amendment refer to all the instrumentalities of the State, to itslegislative, executive, and judicial authorities." . . . "Nor is the contention that the

> railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in Court, and was admitted to make a defence." . . . "In determining what is due process of law regard must be had to substance, not to form." 166 U.S. 233, 234, 235.

So the Court felt obliged to inquire whether compensation for property taken for a public use was an essential feature of due process of law, and determined that it was.

The applicability of this decision to the present case is clear and direct. The Federal constitution contains no express inhibition on the States preventing their taking property without compensation. Compensation is a part of the "due process of law,' only because it has so long been recognized as "founded in natural equity, and is laid down by jurists as a principle of universal law." (166 U.S. 236.) And this is no less true of the principle that a man should not be twice punished for one offence. Even the right to private property is second to that of personal liberty, as is recognized by the Court in its quotation (166 U.S. 236) from Broom on Constitutional Law:

> "Next in degree to the right of personal liberty is that of enjoying private property without undue interference or molestation."

In U.S. *v.* Gibert, 2 Sumner, 19, 38, 60, Mr. Justice Story said of the right to be free from double jeopardy:

> "The privilege thus secured is but a constitutional recognition of an old and well-established maxim of the common law." "The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice may be constantly found recognized by elementary writers and courts of justice from a very early period down to the present time." "I deem it a privilege of inestimable value to the citizen."

And the same views have been clearly and forcibly expressed by this Court in *ex parte* Lange. (See page 20 above.)

A State statute enacting that convicts who had served out their sentence should be subject, at the pleasure of the court, to a further sentence for the same offence would therefore violate the Fourteenth Amendment, no matter what its provisions with reference to procedure. And if a State cannot by legislative enactment deprive citizens of the United States of their liberty in such a way, no more can it do so by the action of its courts without the aid of a statute.

Particularly is this true where, as in the present case, the first sentence was approved by the highest court of the State, and the second was rendered possible only by the reversal of the former decision. In such a case the later decision has all the practical evils of an *ex post facto* law; and the express prohibition of the Constitution (Art. I., sect. 9) with reference to such laws is escaped only because the language of that section is limited to action by the legislature. The action of the court in the present case thus not only violated sacred and long-established rights touching the liberty of the citizen, but also accomplished this result in a manner directly contrary to the spirit of the Constitution. Such action cannot be due process of law.

Respectfully submitted,

BRANDEIS, DUNBAR & NUTTER,
For the Plaintiff in Error.

LOUIS D. BRANDEIS,
EZRA R. THAYER,
EDWARD F. McCLENNEN,
Of Counsel.

Supreme Court of the United States.

October Term, 1899.

No. 480.

Clarence Murphy, Plaintiff in Error,

v.

The Commonwealth of Massachusetts.

BRIEF FOR THE COMMONWEALTH.

Statement of the Case.

The plaintiff in error was indicted under Pub. Sts. of Massachusetts, c. 203, s. 40, and on May 28, 1896, was found guilty in the Superior Court on sixty-three counts, each of which, except two, charged him with the embezzlement of sums of money of more than one hundred dollars each, on different dates between July 19, 1892, and November 29, 1893, from the Salem Savings Bank, a corporation organized under the laws of Massachusetts and having its place of business in Salem in the County of Essex.

On May 29, 1896, he was sentenced under St. 1895, c. 504, for a term of not less than ten nor more than fifteen years' imprisonment in the state prison at Boston, one day thereof to be in solitary confinement and the residue at hard labor, and committed in execution of the sentence. On June 8, 1898, he sued a writ of error out of the Supreme Judicial Court of Massachusetts, and on January 6, 1899, that court reversed the sentence of the Superior Court, on the ground that the statute of 1895, c. 504, was unconstitutional so far as it related to past offences, and remanded the case to the Superior Court, under Pub. Sts., c. 187, s. 13, for sentence according to the law as it was when the offence was committed and before the statute under which he was sentenced took effect. The case is reported in 172 Mass. 264.

On January 7, 1899, he was brought before the Superior Court, pursuant to that decision, and resentenced according to the provisions of Pub. Sts., c. 203, s. 20, and Pub. Sts., c. 215, s. 23, the sentence being to the State prison for nine years, ten months and twenty-one days, the first day thereof to be in solitary confinement and the residue at hard labor.

Before imposing the last sentence, the court said that as he had already served one term of solitary confinement it would prefer not to resentence him to solitary confinement, if his counsel would file a written waiver thereof. The attorney stated that he did not feel justified in filing such a waiver; and thereupon sentence was imposed. The defendant excepted, and requested that all his rights be reserved, on the ground that he had already been in jeopardy for the same offence, and that the sentence abridged his privileges and immunities as a citizen of the United States and deprived him of his liberty without due process of law. The Supreme Judicial Court of Massachusetts overruled his exceptions, and the case comes to this court on error.

The plaintiff assigns as errors in the judgment and the sentence, the following:

(1) They are contrary to the provisions of the Constitution of the United States.

(2) They deprive him of his liberty without due process of law, contrary to the provisions of Article Fourteen of the Amendments of said Constitution.

(3) They abridge his privileges and immunities as a citizen of the United States, contrary to the provisions of Article Fourteen of the Amendments of said Constitution.

(4) They subject him to punishment under an *ex post facto* law, contrary to the provisions of Section Ten of Article One of said Constitution.

(5) By them he suffers punishment twice for the same offence and is placed twice in jeopardy therefor, contrary to Articles Five and Fourteen of the Amendments of said Constitution.

(6) By them he is compelled to suffer punishment under chapter 203 of the Public Statutes of Massachusetts, which the Supreme Judicial Court of Massachusetts has held since his conviction to

be not applicable to the punishment of his offence after the passage of chapter 504 of the Acts of the year 1895, and this although he has already suffered punishment under this latter act while it was still held applicable to his alleged offence.

(7) By them he suffers a punishment which has been substantially changed since his conviction, after he has once suffered punishment for the same offence under chapter 504 of the Acts of 1895, which was then applicable to his offence.

(8) By them he is compelled to suffer the punishment of solitary confinement twice for the same offence.

ARGUMENT.

Before considering assignments of error Nos. 4, 6 and 7, it may be well to refer briefly to the history of the case and to the decisions of the Supreme Judicial Court of Massachusetts bearing upon the subject.

Mass. St. 1895, c. 504, provides as follows: "When a convict is sentenced to the state prison . . . the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and a minimum term for which said convict may be held in prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted."

The offence for which the plaintiff in error stands convicted was committed before this act took effect.

The constitutionality of this statute was challenged in the case of *Commonwealth* v. *Brown*, 167 Mass. 144, which was argued and decided in 1896. So much of the opinion of Mr. Justice Holmes as relates to the statute in question is as follows:

"It is suggested, again without argument, that St. 1895, c. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and one-half years, and not more than a maximum fixed by the court, and not longer than the longest term fixed by law for the punishment of the offence. Such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section two.

But the form of the sentence is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question. Such a form of sentence does not make the punishment more severe than it otherwise would have been, and we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation."

The decision was rendered in November, 1896.

The only question, however, in that case was the constitutionality of the statute as an indeterminate sentence act, and no claim was made by counsel that if constitutional it was not applicable to offences committed before its enactment. The following words, therefore, in the portion of the opinion above quoted, to wit, "we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation," are clearly *obiter dicta*, and cannot be regarded as authoritative.

The direct question as to whether the statute of 1895 was applicable to offences committed prior to its enactment was first raised by this plaintiff in the writ of error sued out by him more than two years after his original sentence, in which he claimed that he could not be sentenced under that act, and that as that act contained no express repealing clause of former statutes he could not be sentenced at all.

The question thus being directly raised, the Supreme Judicial Court of Massachusetts, in *Commonwealth* v. *Murphy*, 172 Mass. 264, held that the indeterminate sentence act did not repeal the former statutes as to offences committed before its enactment, and that the defendant should have been sentenced under such former statutes. In coming to this conclusion, the court, Morton, J., said (p. 266): "In *Commonwealth* v. *Brown*, the court says that it sees no reason why the statute should not be construed to apply to all sentences, in the cases referred to in it, passed after it went into effect. But it is evident that the attention of the court was directed more to the effect of the feature of indeterminate sentences upon the constitutionality of the statute than to other matters. The fact that the statute might interfere with his rights

or privileges in regard to a permit to be at liberty and was therefore objectionable, as *ex post facto* was not suggested in the defendant's brief."

The plaintiff in error was originally sentenced May 29, 1896, and remained in prison in execution of such sentence until January 7, 1899, when he was resentenced.

If the defendant in error appreciates the fourth, sixth and seventh assignments of error before this court, they are in substance that under the law, as declared in *Commonwealth* v. *Brown*, his original sentence was illegal, and that this decision having been overruled by the decision in *Commonwealth* v. *Murphy*, above referred to, the latter decision was in effect *ex post facto*, and that he could not be sentenced in accordance with it. But it is submitted that even if a decision of the court of last resort in a state be so far regarded as the law of the land that a subsequent decision overruling it is to be regarded as a change in the law (which the defendant in error does not concede), no such situation can be predicated of the decisions referred to.

It is scarcely necessary to say that *obiter dictum* is not a decision of the court, and is not binding either upon the court or upon the persons within its jurisdiction.

Cohens v. *Virginia*, 6 Wheat. 264, 399.

The question whether convicts whose crimes were committed before the passage of the indeterminate sentence act could be sentenced under that act was not raised by counsel, nor argued by them, nor directly determined by the court. The opinion of the court dealt directly and only with the question of whether the indeterminate sentence act was constitutional, as such, that being the only question before the court, and the remark of the learned justice above quoted had no reference to the decision and was not a necessary part of it.

The later case, therefore, cannot be said to have overruled *Commonwealth* v. *Brown*, but, at most, to have overruled a dictum of the court not necessary to the conclusion reached.

In *Commonwealth* v. *Crowley*, 168 Mass. 264, which may be relied upon by the plaintiff in error, it does not appear that the

question of whether the indeterminate sentence act could apply to previous offences was argued.

It would be carrying the doctrine of *ex post facto* legislation to its extreme to hold, in any event, that the overruling of a former decision by a court of last resort is a change in the law of a state within the meaning of the Constitution. And even if any such doctrine can be supported, it is certainly not applicable to decisions which merely explain and overrule *obiter dicta*.

Moreover, the defendant in error submits that the provision in the Constitution (Art. 1, s. 10) providing that "No state shall . . . pass any . . . *ex post facto* law," does not, was not intended, and cannot be properly held to apply or refer to the judgments of its courts. Such decisions are not laws passed by the state, but are merely declarations of the law, and if the court on reargument determines that its previous declarations are erroneous, the last declaration is not a change in the law, but, rather, a change in the construction to be given to the law by the courts.

"In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only."

Gray, J., in Central Land Co. v. Laidley, 159 U. S. 103, 109.

It may also be said that even if the *dictum* of the court in *Commonwealth* v. *Brown* be held to be a law which could not be changed to affect the rights of the prisoner, it was not promulgated until after his sentence. The decision was in November, 1896, and the sentence was in May, 1896. If a decision is to be regarded, with reference to this clause of the Constitution, as a law of the state, it was not law until it was so declared by the court. The prisoner, therefore, was in execution of his first sentence before the law was declared, and continued to be so in execution of his sentence until after it was changed, if it could be said to be changed by the decision in *Commonwealth* v. *Murphy*. If the de-

cision was an *ex post facto* law, it was both made and repealed after his sentence; and he cannot now stand upon it.

The argument, therefore, that the plaintiff in error is now under sentence under an *ex post facto* law, in violation of the Constitution of the United States, is not supported by the facts, under any construction of the law.

The remaining assignments of error are, in substance:

(1) That the plaintiff in error has been twice put in jeopardy.

(2) That his privileges and immunities under the Fourteenth Amendment have been abridged.

(3) That he has been imprisoned without due process of law.

As to the last allegation, to wit, that the plaintiff in error has been deprived of his liberty without due process of law, the defendant in error submits that a recital of the provisions of the laws under and in consequence of which the plaintiff in error is now in confinement leaves no room for question that the allegation is not sustained.

The plaintiff in error was originally sentenced to a term of not less than ten nor more than fifteen years in the state prison, the first day to be in solitary confinement. He actually served, under this sentence, a period of two years, seven months and ten days. The resentence was for nine years, ten months and twenty-one days. The total amount of imprisonment under both sentences would be twelve years and six months. It was obviously the purpose of the justice, at the time of the resentence, to make the whole sentence equal to the average of the minimum and maximum prescribed by the first sentence. It will not be denied that the crime was within the jurisdiction of the court imposing sentence, that both sentences were within the limits of the statutes fixing the penalty for the offence of embezzlement, and that the total amount of both sentences was also within the same limit.

The crime for which the plaintiff in error stands convict was committed prior to the year 1895. He was originally sentenced in May, 1896. It is now conceded under the authority of *Murphy* v. *Commonwealth*, 172 Mass. 264, that the original sentence was error, and that he should have been sentenced, not under the inde-

terminate sentence act of 1895, but under the statutes as they stood before the passage of that act.

The plaintiff in error appears to have remained for more than two years content with his sentence. In May, 1898, he applied to the Circuit Court of the United States for a writ of *habeas corpus*. *In re Murphy*, 87 Fed. Rep. 549. This was denied him upon the obvious ground that the remedy of a writ of error was open to him in the courts of the state, who, upon a judgment of error, would be authorized to correct and revise the sentence.

The authority of the appellate court at common law, upon proceedings in error, in which it was determined that the original sentence was erroneous, to revise the sentence and render the judgment which the trial court should have rendered, is not wholly clear.

In *Commonwealth* v. *Ellis*, 11 Mass. 462, 466, it was said: "The general principle is well settled. If the judgment complained of was rendered by a court proceeding according to the course of common law, a writ of error lies, in which, in case of reversal, this court is authorized to render the same judgment as the court below ought to have rendered."

But in *Shepherd* v. *Commonwealth*, 2 Met. 419 (1841), it was held, that where there had been error in the sentence the court could not send a case back to the trial court to render a new judgment, nor could it render a new judgment, but could only annul the erroneous judgment and order the prisoner to be discharged.

It has been held, however, in various jurisdictions, that the appellate court has the right, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law.

Reynolds v. *United States*, 98 U. S. 145, 168, note.
In re Bonner, 151 U. S. 242, 259.
Roberts v. *State*, 30 Fla. 82.
Beale v. *Commonwealth*, 25 Penn. 11.
Henderson v. *People*, 165 Ill. 607.
Lowrey v. *Hogue*, 85 Cal. 601.

See also —

Brooks v. *Commonwealth*, 4 Leigh, 669.
Oliver v. *State*, 5 How. (Miss.) 14, 19.
Lynn v. *State*, 84 Md. 67, 83.
Harris's Case, 68 Vt. 243.
Papworth v. *City of Fitzgerald*, 156 Ga. 378.
Harrington v. *State*, 87 Ala. 1, 4.
State v. *Taylor*, 124 N. C. 803.
State v. *Williams*, 40 S. C. 373, 382.
Hathcock v. *State*, 88 Ga. 91, 99.
Graham v. *State*, 79 Wis. 651. Argued and decided after *in re Graham*, 138 U. S. 461.
United States v. *Pridgeon*, 153 U. S. 48, 63.
Coleman v. *Tennessee*, 97 U. S. 509, 519.
United States v. *Harmon*, 68 Fed. Rep. 472.

In view of the uncertainty as to the right of the court in case of erroneous sentence, and of the injustice of permitting a prisoner to go free in case the original sentence was erroneous, the Attorney-General of Massachusetts, in his report to the General Court for the year 1842, called the attention of that body to the decision of the court in *Shepherd* v. *Commonwealth*, *ubi supra*, saying that "fourteen convicts have already been liberated by the supreme court," and suggesting that a law should be enacted to enable that court in such cases "to pass such new judgment as justice and equity require." Attorney-General's Report of January, 1843, page 5. No action was taken by the Legislature, however, and *Shepherd* v. *Commonwealth* was virtually approved in *Sumner* v. *Commonwealth*, 3 Cush. 521. (1849).

The matter was again called to the attention of the General Court by the Attorney-General in his report for the year 1850. He said: "It is respectfully submitted that this doctrine is not in harmony with the theoretical perfection of the common law; and I think it can be successfully maintained that it was not originally a feature of that system. And the first case in which it was held in England is comparatively recent, and arose out of an error in

sentencing a party to transportation, when the law had affixed to the offence of which he was convicted, the punishment of death.

The natural repugnance of the judges, before whom a writ of error was brought, to correct the error by proceeding to a capital sentence, led them, *in favorem vitae*, into a departure from the true principles of the common law, by discharge of the prisoner.

This precedent has been followed in England and in some of the states of this Union, until the courts, by their adherence to it, are liable to commit more and graver errors than they correct."

"To restore this principle, so obviously an essential element in any well-considered, effective system of criminal jurisprudence, I respectfully suggest the expediency of providing by express enactment that whenever a final judgment in a criminal case shall be reversed upon a writ of error by the supreme judicial court, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." Attorney-General's Report of February, 1851, pages 5 and 6.

The case in England referred to is *Bourne* v. *King*, 7 Ad. & El. 58.

Following his suggestion, the Legislature enacted the statute of 1851, c. 87, which is now Pub. Sts., c. 187, s. 13.

The statute referred to is as follows: "When a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had."

A similar statute had shortly before been enacted in England. St. 11 and 12 Vict., c. 78, s. 5. Similar legislation has been enacted in some other states.

The provisions of the statute have been applied in Massachusetts in *Jaquins* v. *Commonwealth*, 9 Cush. 279, and in *Commonwealth* v. *Haynes*, 107 Mass. 194, 198.

It was doubtless in view of this statute in Massachusetts that the circuit judge denied the writ of *habeas corpus*. Thereupon,

to wit, in June, 1898, over two years after his original sentence, the present plaintiff in error sued out a writ of error in the Supreme Judicial Court, alleging that the sentence of the Superior Court was erroneous, having been imposed under the provisions of the indeterminate sentence act, which took effect after the commission of the crime of which he was convicted. In this proceeding he availed himself of the provisions of Pub. Sts., c. 187, s. 9, as follows: "Writs of error upon judgments in criminal cases may be brought at any time after judgment is rendered, and may be entered in any county." This section is contained in the same chapter as the section before quoted, giving the right to the court on judgment of error to render such judgment as ought to have been originally rendered.

The court having adjudged the original sentence to be erroneous, thereupon remanded the case to the court in which the sentence was originally pronounced for resentence according to law; and it will not be denied that the sentence thereupon imposed was in accordance with the statutes in force before the enactment of the indeterminate sentence act of 1895.

It may be affirmed, therefore, that all the proceedings which resulted in the sentence of the prisoner, which he is now serving were in strict accordance with provisions of law which had long been in force in the Commonwealth of Massachusetts and in some other states of the Union, as well as in Great Britain Every step taken was in obedience to statutes which have been in force for nearly fifty years. The allegation, therefore, that he is deprived of his liberty without due process of law by the Commonwealth of Massachusetts, can be based only upon the proposition that the law is unreasonable, unjust, in derogation of his natural rights, and intended to operate as a hardship upon the individual.

It is too late to make such a claim. While it is undoubtedly true that the force of the Fourteenth Amendment is not destroyed by reason of the fact that proceedings under which rights are taken away are within the provisions of statute, yet if the proceedings are in accordance with the well-settled law of the jurisdiction, reasonable in their nature, and intended for the security, not only for the prisoner, but the community, and are in accord-

ance with the established usage and practice of the state, they are not affected by the provisions in question.

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Hurtado v. *California*, 110 U. S. 516, 537.
Hodgson v. *Vermont*, 168 U. S. 262, 272, 273.

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. . . . The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century, and make such changes as may be necessary."

Brown v. *New Jersey*, 175 U. S. 172, 175.

See also

In re Kemmler, 136 U. S. 436, 449.
Moore v. *Missouri*, 159 U. S. 673, 678.
In re Converse, 137 U. S. 624.

It is well settled that the Fourteenth Amendment does not pretend to secure to all persons in the United States the benefit of the same laws and the same remedies; but only that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Missouri v. *Lewis*, 101 U. S. 22, 31.

The proceedings under which the plaintiff in error was resentenced, comprising, as they do, a writ of error granted to him under the statutes of Massachusetts, a judgment of the court

that error had been committed, and a remanding of the case to the trial court for judgment in accordance with the law, are designed not only to guard the prisoner's rights but as well to prevent that failure of justice which would be a denial of justice to the community. The prisoner had committed a great crime, for which he should be imprisoned. To permit him to go at large, would be injustice to the community. To require him to serve a sentence even technically wrong, would be a denial of justice to him. The statutes, therefore, permitting him to have the judgment corrected and permitting the state to have the judgment to which it is entitled, are not only not oppressive, unusual or arbitrary, but are designed to secure the fullest justice to all persons in the community and to the prisoner as well. They operate upon all alike, and are not only "due process of law," but a process of law as wise as it is possible for the ingenuity of man to devise.

The fact that the prisoner has already been in confinement for a substantial period under an erroneous sentence is not of consequence in this proceeding. If that was injustice, it is not the matter of his present claim, which refers not to his original sentence but to the sentence he is now serving. Nor was any substantial injustice done to him. All laws are made upon the presumption that the court will see to it that injustice is not done to the individual. In point of fact, the whole amount of the two sentences imposed by the trial court was twelve years and six months. This was the average of the minimum and maximum of the original sentence. Moreover, if under the forms of law injustice is done to a prisoner by the state, it is presumed that the sovereign body will make due recompense therefor in its own way. Whatever his wrongs may have been, they are not to be remedied by this proceeding.

Moreover, it is not unfair to the plaintiff in error to say that the substantial imprisonment he underwent under the original sentence was in consequence of his own laches. His right to a writ of error arose as soon as the sentence was pronounced, and the statutes of Massachusetts provide, in his favor, that the questions arising thereon shall be determined "without delay." Pub. Sts., c. 187, s. 9. The purpose of this provision was doubtless to give

the same rate of speed to writs of error as already existed in cases of *habeas corpus*.

It was also the right of the defendant to apply to the justices of the Supreme Judicial Court for a stay of proceedings on the original sentence. Pub. Sts., c. 187, s. 11. This the prisoner did not do.

He appears to have been content to let his sentence run on for more than two years, although it was within his power, not merely to shorten the period, but perhaps to be released upon bail, resting upon his rights in the hope, it may be, that thereby he might induce this court finally to take such action as would result in his not performing the sentence which was the just deserts of his crime.

It cannot be said that he was deterred from bringing his writ of error by the decision in *Commonwealth* v. *Brown*; for that case was not decided until eight months after he was originally sentenced.

It may be contended that he was compelled to undergo two periods of solitary confinement. It is a sufficient answer, however, to this suggestion, to say that the solitary imprisonment is not of itself a sentence, but is only a method provided for the carrying out of the sentence of the court. It is a necessary part of the sentence, but is not an additional sentence. It is within the discretion of the court, after having fixed the term of imprisonment, to make any part of such imprisonment, up to twenty days, solitary; the apparent purpose being, not an additional punishment, but to give the prisoner opportunity for reflection before entering upon the period of hard labor which comprises the remainder of his sentence. Moreover, both terms of solitary imprisonment have been completed. There is nothing in this respect to be corrected by any judgment of this court. He seeks relief in these proceedings, not from a sentence of solitary imprisonment, for that has been performed, but for discharge from further imprisonment.

It is apprehended that the principal contention of the plaintiff in error will be, that under the proceedings in the state courts he has been twice put in jeopardy, and that in this respect they are in

violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

There is no provision against a person being twice put in jeopardy in the Constitution of Massachusetts.

It is too well settled to require argument at this time that the Fifth Amendment to the Constitution of the United States, the only provision in that instrument directly forbidding the putting of a person twice in jeopardy, contains no restrictions on the powers of a state, but was intended to operate solely on Federal Government.

Brown v. *New Jersey*, 175 U. S. 172, 174; and cases cited.

The plaintiff in error, therefore, must base his contention as to this part of his claim solely upon the Fourteenth Amendment, and doubtless upon that part of the section which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The defendant in error does not propose at this time to enter into a discussion of the question whether the "privileges and immunities" in this amendment refer to the rights of citizens guaranteed under the first ten amendments of the Constitution, although in every case in which the question has been raised, it has been held by this court that such is not the meaning of the clause in question.

Slaughter-House Cases, 16 Wall. 36.
Spies v. *Illinois*, 123 U. S. 131.
In re Kemmler, 136 U. S. 436.

See also

O'Neil v. *Vermont*, 144 U. S. 323.
Hodgson v. *Vermont*, 168 U. S. 262.
Bartemeyer v. *Iowa*, 18 Wall. 129.
United States v. *Reese*, 92 U. S. 214.
United States v. *Cruikshank*, 92 U. S. 542.

The same section which prohibits a person being put twice in jeopardy (Fifth Amendment) also provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury."

In *Hurtado* v. *California*, 110 U. S. 516, the plaintiff in error had been proceeded against not upon indictment but upon information. If the contention of the plaintiff in error that the Fourteenth Amendment includes, as to citizens of the United States, the provisions of the Fifth Amendment, it certainly includes as well the right to protection from criminal proceedings excepting upon presentment of a grand jury. And it is at least significant that throughout the discussion of the case of *Hurtado* v. *California* there is no suggestion that the proceedings against him were unconstitutional for the reason that they were in violation of his "privileges and immunities" as a citizen of the United States.

It appears to be well settled that the privileges and immunities referred to in the Fourteenth Amendment were intended rather for the "protection of every citizen of the United States against hostile and discriminate legislation against him in favor of others, whether they reside in the same or in different states."

Field, J., in *Slaughter-House Cases*, 16 Wall. 36, 101.

But defendant in error submits that the plaintiff in error was not put twice in jeopardy, within the meaning of those words as used at common law and in the Constitution of the United States.

The maxim that no person shall be twice put in jeopardy is based upon the proposition that a judicial proceeding which has been lawfully carried to its conclusion, by a final judgment puts the seal of finalty on the controversies determined by that judgment. Jeopardy exists through every stage of the prosecution, as fixed by the existing laws relating to procedure, and while any stage of such prosecution remains undetermined the jeopardy has not been exhausted.

The term jeopardy "has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction."

McKee v. *People*, 32 N. Y. 239, 245.
State v. *Lee*, 65 Conn. 265.

The legal proceedings incident to the conviction of the plaintiff in error could not be said to have been finally ended until he had

availed himself of the privilege given him by the statute of taking out a writ of error. The same jeopardy continued, no less so than in cases where exceptions are overruled or motions for new trial are granted.

Consistent with the principle that when a controversy is finally determined it shall not be reopened, statutes authorizing re-trials and resentences have been in force from time immemorial. Even the right of the government to a new trial after a verdict of not guilty, has been upheld.

State v. *Lee*, 65 Conn. 265.
United States v. *Sanges*, 144 U. S. 310, 312, 318.

The writ of error sued out by the defendant was but a continuation, authorized by the statutes of Massachusetts, of the original proceedings against him, and the jeopardy which begun when a jury was impanelled and he was put to trial, did not, in contemplation of law, end until the final judgment upon the writ of error and sentence in pursuance thereof.

The privilege of error was his alone. It was his right to have accepted the original sentence, and having served it, to end his jeopardy, and thereupon to have been exempt from further proceedings.

Commonwealth v. *Loud*, 3 Met. 323.

The writ of error was no new instrument of prosecution instituted against him by the state. It was taken out by him in the exercise of his privilege, with knowledge of the provisions of the statutes providing for a correction of the original erroneous judgment. Such a correction of the sentence he must be deemed to have sought when he sued out his writ of error; and he could not be heard to object to the consequences attendant upon such a writ. The statutes of Massachusetts, and of other states, provide that a person may be sentenced notwithstanding the pendency of exceptions taken by him in the course of the proceeding of the trial. St. 1894, c. 469. The fact that such sentence is imposed, and the defendant is imprisoned during the pendency of the exceptions,

does not create, in case the exceptions are sustained, a new jeopardy or constitute a new invasion of the prisoner's rights.

For the purposes of the questions now raised, the case stands exactly the same as it would if the prisoner had sued out his writ of error on the day he was sentenced, as he might have done, and had procured a stay of the judgment under the provisions of the statutes authorizing the granting thereof, and remained at liberty until the determination of the questions raised by the writ of error. In such case, although there would have been two sentences imposed by the Superior Court, there would have been but one imprisonment.

The mere fact that, partly, at least, in consequence of his own laches, the prisoner served a portion of the erroneous sentence, in no way makes the proceedings after the writ of error a new jeopardy.

HOSEA M. KNOWLTON,
Attorney-General.
ARTHUR W. DEGOOSH,
Assistant Attorney-General.

MURPHY *v.* MASSACHUSETTS.

177 155 L-ed 711 f 179 679
177 155 L-ed 711 101 f 820
177 155 44 L-ed 711 114 f 305

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 480. Argued February 28, March 1, 1900. — Decided April 9, 1900.

Murphy was tried in a state court of Massachusetts on an indictment charging him with embezzlement; was convicted; and was sentenced to imprisonment for a term, one day of which was to be in solitary confinement, and the rest at hard labor. He remained in confinement for nearly three years, and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was then remanded to the court below to have him resentenced, which was done. Before imposing the new sentence the court said that as he had already suffered one term of solitary confinement, the court would not impose another, if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver, and the sentence was accordingly imposed. Upon his taking steps to have the sentence set aside, *held* that his contention in that respect was unavailing.

PLAINTIFF in error, a citizen of the Commonwealth of Massachusetts and of the United States, was tried in the Superior Court of Massachusetts on an indictment which charged him in sixty-four counts with the embezzlement of different sums of money on different days between July 19, 1892, and November 29, 1893, contrary to the provisions of section forty of chapter 203 of the Public Statutes of Massachusetts; was found guilty, and on May 29, 1896, was sentenced under chapter 504 of the statutes of 1895 to imprisonment in the state's prison of the Commonwealth at Boston for the term of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and the residue at hard labor, and on that day, in execution of said sentence, was committed to that prison. He remained in solitary confinement for one day and in the prison continuously from May 29, 1896, to January 7, 1899.

On June 8, 1898, he sued a writ of error out of the Supreme Judicial Court of Massachusetts, and on January 6, 1899, that court reversed the sentence of the Superior Court on the ground that the statute of 1895, c. 504, was unconstitutional so far as it related to past offenses, and remanded the case to the Superior Court under Public Statutes, c. 187, § 13, to be resentenced according to the law as it was when the offenses were committed, and before the statute under which he had been sentenced took effect. 172 Mass. 264.

January 7, 1899, he was brought before the Superior Court pursuant to that direction, and resentenced according to the provisions of Public Statutes, c. 203, § 20, and Public Statutes, c. 215, § 23, the sentence being to the state's prison for nine years, ten months and twenty-one days, the first day thereof to be in solitary confinement, and the residue at hard labor. Before imposing this sentence the court stated to Murphy's attorney that as Murphy had already suffered one term of solitary confinement for the offenses for which he was now to be sentenced, it would prefer not to sentence to solitary confinement, and that it would not do so, if a written waiver by the prisoner of the provision therefor were filed; but the attorney did not feel justified in filing such a waiver. Murphy duly excepted to the sentence last imposed, and requested that all his rights be reserved. Exceptions having been allowed, the case was carried on error to the Supreme Judicial Court, which overruled them. 54 N. E. Rep. 860. This writ of error was then sued out.

Mr. Ezra Ripley Thayer for plaintiff in error. *Mr. Louis D. Brandeis* and *Mr. Edward F. McClennen* were on his brief.

Mr. Hosea M. Knowlton for defendant in error. *Mr. Arthur W. DeGoosh* was on his brief.

Mr. Chief Justice Fuller delivered the opinion of the court.

The specification of errors in the brief of counsel is as follows: "The contention of the plaintiff in error is that the sentence under which he is now held puts him twice in jeop-

ardy, and that such double jeopardy abridges his privileges and immunities as a citizen of the United States, and deprives him of his liberty without due process of law."

Laying out of view the suggestion that the immunity from double jeopardy or double punishment of a citizen of Massachusetts, in Massachusetts, is an immunity possessed by him as a citizen of the United States as contradistinguished from a citizen of Massachusetts, we inquire whether any law of Massachusetts abridges such an immunity, and whether that or any other action of that Commonwealth deprives plaintiff in error of his liberty without due process of law. If there be no such law, and if he is suffering no such deprivation, we need not be curious in explanation of the particular ground of our exercise of jurisdiction.

The statutes of Massachusetts have provided since 1851 (act of April 30, 1851, c. 87) that "when a final judgment in a criminal case is reversed by the Supreme Judicial Court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." Acts of 1851, p. 602, c. 87; Pub. St. c. 187, § 13.

In this case it was on account of error in the sentence as originally imposed that that sentence was set aside. All the proceedings prior thereto stood unimpugned, and the Superior Court merely rendered the judgment which should have been rendered before. And this was done under the statute by direction of the Supreme Judicial Court, whose interposition had been invoked by plaintiff in error.

The legal effect of the statute was to make it a condition of the bringing of writs of error in criminal cases that if the error was one in the award of punishment only, that error should be corrected, and, as remarked by Chief Justice Shaw, this did not disturb the fundamental principles of right. *Jacquins* v. *Commonwealth*, 9 Cush. 279. Indeed, in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law. *Reynolds* v. *United States*, 98 U. S. 145, 168; *In re Bonner*, 151 U. S. 242; *Hen-*

derson v. *People*, 165 Illinois, 607; *Beale* v. *Commonwealth*, 25 Penn. St. 11. And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State to the accused upon such conditions as the State deems proper. *McKane* v. *Durston*, 153 U. S. 684; *Andrews* v. *Swartz*, 156 U. S. 272; *Kohl* v. *Lehlback*, 160 U. S. 293, 297.

As this statute was reasonable, was intended for the benefit of the accused as well as of the community, and was entirely within the admitted powers of the State, we are unable to see that it is in itself open to attack as being unconstitutional; and as this plaintiff in error set the proceedings in question in motion, and they conformed to the statute, we do not perceive how they can be regarded as otherwise than valid.

In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.

Ball v. *United States*, 163 U. S. 662, illustrates the rule. There Millard F. Ball, John C. Ball and Robert E. Boutwell had been indicted, in the Circuit Court of the United States for the Eastern District of Texas, for the murder of one Box, and on trial Millard F. Ball had been acquitted and discharged, and John C. Ball and Boutwell convicted and sentenced to death. The condemned having brought the case here on error, it was held that the indictment was fatally defective, and the judgment was reversed and the cause remanded with a direction to quash the indictment. *Ball* v. *United States*, 140 U. S. 118. The mandate went down, the indictment was dismissed, and a new indictment was returned against all three defendants. To this Millard F. Ball filed a plea of former jeopardy and former acquittal, and John C. Ball and Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment. Both these pleas were overruled, defendants pleaded not guilty, were convicted and sentenced to death.

On their writ of error this court held that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. Mr. Justice Gray, delivering the opinion, said:

"An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. c. 35, § 3; 1 Bishop's Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. *Ex parte Parks*, 93 U. S. 18. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States* v. *Sanges*, 144 U. S. 310."

The judgment was reversed as to Millard F. Ball, and judgment rendered for him upon his plea of former acquittal.

But as to John C. Ball and Boutwell, it was ruled that the Circuit Court rightly overruled their plea of former jeopardy, and it was said (163 U. S. 662, 671):

"Their plea of former conviction cannot be sustained, because upon a writ of error, sued out by themselves, the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them, need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. *Hopt* v. *Utah*, 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430; *Regina* v. *Drury*,

3 Cox Crim. Cas. 544; *S. C.* 3 Car. & Kirw. 193; *Commonwealth* v. *Gould*, 12 Gray, 171."

Tested by these rulings, plaintiff in error's original sentence was not void but voidable, and if the sentence had been complied with he could not have been punished again for the same offense. *Commonwealth* v. *Loud*, 3 Met. 328. But as the original sentence was set aside at his own instance, he could not allege that he had been in legal jeopardy by reason thereof.

In *Ex parte Lange*, 18 Wall. 163, Lange had been found guilty of an offense which was punishable by imprisonment *or* fine, but the Circuit Court sentenced him to imprisonment *and* fine. He paid the fine, and thereafter the Circuit Court vacated the former judgment, and sentenced him again to imprisonment only. It was held that it was a fundamental principle that no man could be twice punished by judicial judgments for the same offense, and that when a judgment had been executed by full satisfaction of one of the alternative penalties of the law, the court could not change the judgment so as to impose another. The present case does not fall within that decision, for here an erroneous judgment was vacated on the application of the accused; the original sentence had not been fully satisfied; and the second sentence was rendered in pursuance of the applicable statute.

We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered. And as the decision which he sought and obtained involved the determination that he had been improperly sentenced under chapter 504 of the Statutes of 1895, providing for so-called indeterminate sentences, but should have been sentenced under antecedent statutes, which differed from that, it followed that the second sentence must be a new sentence to the extent of those differences, and might turn out to be for a longer period of imprisonment.

Chapter 504 of the Statutes of 1895 provided for the establishment by the court of a maximum and minimum term of

imprisonment, and for a permit to the convict to be at liberty after the expiration of the minimum term, some changes being made in this regard by chapter 371 of the Statutes of 1898. Section 20 of chapter 222 of the Public Statutes, in force when the offences charged were committed, provided for certain deductions to be made for good behavior. These and other statutes bearing on the subject are fully set forth and examined in *Murphy* v. *Commonwealth*, 172 Mass. 264. And it is insisted that, under the present sentence, even if the prisoner received the maximum deduction, he cannot be released as soon as he might have been released under the original sentence, and that moreover he cannot receive as large deductions under this sentence as he might have received if it had been pronounced in the first instance.

But we agree with the Supreme Judicial Court in the opinion that even if this were so, it would make no difference in principle so far as the validity of the second sentence was concerned.

In *Jacquins' Case*, 9 Cush. 279, the Supreme Judicial Court, in lieu of the prior sentences, sentenced the defendant to certain years of imprisonment, "the term to be computed from the time when the first sentence commenced its operation."

In the case at bar, the accused was originally sentenced to imprisonment for the term of not less than ten nor more than fifteen years. This being set aside, and the Superior Court, being manifestly of opinion that imprisonment for twelve years and six months was the punishment demanded under the circumstances, deducted from twelve years and six months, two years, seven months and nine days, which he had already served, and sentenced him to nine years, ten months and twenty-one days. As the original sentence had been vacated on the application of the accused it is clear that if the second sentence were productive of any injustice the remedy was to be obtained in another quarter and did not rest with the court.

The Superior Court, being obliged to render a specific sentence, deducted the time Murphy had served notwithstanding the case really occupied the same posture as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of the delay in doing so he had served a

portion of the erroneous sentence could not entitle him to assert that he was being twice punished. Perhaps the court was the more moved to do this because six months after Murphy had been sent to the state prison the Supreme Judicial Court indicated in *Commonwealth* v. *Brown*, 167 Mass. 144, that the indeterminate sentence act might be applicable to convictions for offences committed prior to its passage, although the question was not definitely presented and disposed of, and then to the contrary, until raised on Murphy's writ of error. 172 Mass. 264. But, however that may be, the plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence, reversed or vacated on the prisoner's own application.

And so as to the infliction of one day's solitary confinement. The Massachusetts statutes provide that where the punishment of imprisonment in the state prison is awarded, solitary confinement not exceeding twenty days at a time shall form part thereof. This requirement was complied with here by the infliction of one day. This was part of the sentence, but not in itself a distinct and separate punishment, and when the sentence was vacated the second sentence necessarily contained some solitary confinement as part of the imprisonment. Apparently this might have been dispensed with by the consent of the convict, but this he refused to give.

In *People ex rel. Trezza* v. *Brush*, 128 N. Y. 529, 536, Trezza had been sentenced to death, and prosecuted an appeal to the Court of Appeals of New York, pending which he was taken to the state prison and detained in close confinement. He applied for the writ of *habeas corpus* on the ground that he had been once punished, which was denied. The Court of Appeals held that by the statute an appeal from a conviction in a capital case stayed the judgment of death only, and not that part of the judgment which provided for the custody of the defendant between his removal to the state prison and his execution; and Andrews, J., speaking for the court, said: "It not infrequently happens that the execution of a sentence to imprisonment continues, notwithstanding an appeal. The convict, if he obtains a reversal of the judgment, and is again convicted on a second trial, may be sentenced to a new term of imprisonment,

and the court is not bound to regulate the second sentence in view of the fact that the convict has already suffered imprisonment under the first sentence. The resentence in the present case was rendered necessary by reason of the fact that Trezza, by his own act in his own interest, had by his appeal prevented the execution of the death penalty at the time fixed by the first sentence."

Trezza also applied to the Circuit Court of the United States for the Southern District of New York for a writ of *habeas corpus*, which the court refused to grant, and its order was affirmed by this court on appeal. 142 U. S. 160.

In *McElvaine* v. *Brush*, 142 U. S. 155, McElvaine had been sentenced to death, and the judgment was reversed and a new trial granted. He was again convicted and sentenced, and the judgment affirmed on appeal. 125 N. Y. 596. McElvaine presented his petition for *habeas corpus* to the Circuit Court, which was denied, and the case brought to this court. The order was affirmed, and we said, among other things, that "so far as the confinement had taken place under the first sentence and warrant, that resulted from the voluntary act of the petitioner in prosecuting an appeal."

In *Brown* v. *New Jersey*, 175 U. S. 172, it was reiterated that "the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." We find no such denial or conflict in this case. As we have said, plaintiff in error must be deemed to have sought a correction of the original erroneous judgment, and held to abide the consequences. He seems to have then supposed that it might be decided that the prior statutes were repealed by the act of 1895, and that as he could not be sentenced under that act, he might be discharged altogether. In this it turned out that he was mistaken, as the Supreme Judicial Court adjudged that the prior statutes were still in force so far as he was concerned, and we concur with that court in holding that his present contention is equally unavailing to effect his release.

Judgment affirmed.